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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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In re

Amendment of the Commission's Rules)
Regarding Competitive Bidding for)
Commercial Broadcast and Instructional) MM Docket No. 97-234
Television Fixed Service Licenses;) GC Docket No. 92-52
Comparative Broadcast Hearings) GEN Docket No. 90-264

To: The Commission

COMMENTS ON NOTICE OF PROPOSED RULE MAKING

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Summary

Mr. Cavallo is submitting these comments to address key issues concerning the auction design and related processes, especially as they may affect the Commission's ability to expedite the availability of new broadcast service to the public.

Mr. Cavallo agrees with the Commission's tentative conclusion that settlements with respect to applications filed after July 1, 1997, should be allowed up to the filing of the short-form auction application. Moreover, the Commission should go one step further and permanently modify its policies to encourage settlements by removing restrictions against White Knight settlements and by eliminating Section 73.3525(a)(3)'s restriction on reimbursements in excess of expenses. The Commission should take these actions because encouraging broadcast settlements is in the public interest as it encourages the provision of new service and attendant programming diversity, and saves the Commission the administrative costs of processing mutually exclusive applications.

The Commission should fashion its auction rules so it expedites service to the public. This should include expediting resolution of this proceeding and the scheduling of the broadcast auctions authorized hereby. Delay in awarding licenses frustrates the ability of applicants to implement their plans in addition to denying communities additional outlets for the expression of opinion and viewpoint. Likewise, the Commission should take steps to expedite the award of licenses following an auction, and

disincent disappoointed bidders from raising spurious objections to winning bidders. This should include taxing attorneys fees and costs on frivolous opposition filings. Furthermore, Commission action on such petitions and review proceedings on their denial should be expedited so that the public is not deprived of service by lengthy post auction litigation.

With respect to reserve prices, in the context of broadcast spectrum, reserve bids would not be in the public interest. The broadcast service is well established, with an active market for the sale of broadcast stations. That market can be trusted to assure fair value is bid in the auction.

As to the issue of reopening closed filing windows, the Commission should decline to do so. All interested applicants have had the opportunity to file for closed facilities. Nothing would be gained by giving potential applicants another bite at the apple, especially since it would prejudice existing applicants who filed in good faith reliance on cut-off windows.

Although Mr. Cavallo does not favor awarding bidding credits to rural telephone companies, bidding credits are justified to other designated entities, such as small businesses and minority owned enterprises. Moreover, bidding credits are justified to encourage the diversification of the ownership of broadcast properties. It cannot be seriously disputed that substantial concentration in the ownership of the media of mass communications has recently occurred. At the same time minority ownership of

broadcast facilities appears to be declining, and can be expected to decline further as a result of broadcast auctions. Existing station owners have the ability to benefit from economies of scale of operations, and are thus likely to value broadcast spectrum at a higher level than other applicants.

Because of the advantages existing broadcasters have over persons who do not own broadcast facilities, unless small business, minorities, and non-broadcast holding applicants are afforded bidding credits, they are not likely to obtain broadcast facilities at auction. Given the First Amendment values fostered by maximizing the available sources of opinion and viewpoint, a compelling case exists for awarding these classes of applicants bidding credits.

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To: The Commission

COMMENTS ON NOTICE OF PROPOSED RULE MAKING

Joseph G. Cavallo, by counsel and pursuant to FCC Rule Section 1.429 submits his comments on the Commission's *Notice of Proposed Rule Making*, FCC 97-397 (November 26, 1997), 62 Fed. Reg. 65392 (December 12, 1997) ("*NPRM*") in the above-referenced proceeding, and shows the following:

I. Introduction.

1. This proceeding presents the Commission with various issues relating to its expanded authority to employ competitive bidding to decide among mutually exclusive initial broadcast applicants. Pursuant to Section 309(j)(1), the Commission is required to employ auctions for mutually exclusive applications filed after July 1, 1997, and may employ auctions for applications filed prior to that date.

2. Mr. Cavallo has pending applications to construct new FM stations at Lenwood (Channel 245A) and Baker (Channel 235B1), California, filed on November 5, 1997. His applications were submitted after Mr. Cavallo sought the opening of a filing window

in connection with these two vacant facilities.^{1/} As such, resolution of certain issues raised in the *NPRM* will vitally affect him. Accordingly, Mr. Cavallo is submitting these comments to address key issues concerning the auction design and related processes, especially as they may affect the Commission's ability to expedite the availability of new broadcast service to the public.

II. The Commission should encourage settlements of mutually exclusive applicants.

3. Section 309(1)(3) provides a period of 180 days following enactment of the Balanced Budget Act (on August 5, 1997) during which the Commission must waive any provisions of its regulations necessary to permit mutually exclusive applicants to enter into agreements to remove a conflict between applications. This would include waiver of Section 73.3525(a)(3), which limits the reimbursement of applicants to their legitimate and prudent expenses, and waiver of the Commission's policy against "white knight" settlements -- i.e., settlements involving the award of a permit to a non-applicant third party. *NPRM* at 26.

4. Mr. Cavallo agrees with the Commission's indication (at *NPRM* at 27), that the Commission is not required to waive its settlement policies for applications filed after July 1, 1997. Mr. Cavallo also agrees with the Commission's tentative conclusion, *NPRM* at para. 45, however, that settlements with respect to

^{1/} The channels were vacated when the previous licensee/permittee turned in its authorizations for these two facilities in the course of a compliance investigation.

applications filed after July 1, 1997, should be allowed up to the filing of the short-form auction application. Moreover, Mr. Cavallo suggests the Commission go one step further and permanently modify its policies to encourage such settlements by removing restrictions against White Knight settlements and by eliminating Section 73.3525(a)(3)'s restriction on reimbursements in excess of expenses.

5. The Commission should take these actions because encouraging broadcast settlements is in the public interest. Settlements of broadcast proceedings encourage the provision of new service and save the Commission the administrative costs of processing mutually exclusive applications. New service, of course, facilitates the First Amendment interest of encouraging the maximum diversification of the media of mass communications, including facilitating increased minority ownership of broadcast stations.

6. Although auctions will help to eliminate a serious backlog in processing new broadcast applications, those familiar with the history of FCC licensing proceedings will understand that auctions are unlikely to cure the interminable delay that exists in obtaining an initial license. Substituting auctions for comparative hearings will still leave applicants free to raise all myriad of basic qualifications issues, including site, character, technical, and financial,^{2/} with the inevitable series of appeals

^{2/} Recent experience with the Personal Communications Service ("PCS") and other auctioned services have made it abundantly
(continued...)

which follow.^{3/} Providing the parties the opportunity to settle without Commission restrictions will help discourage floods of paper from applicants who often file spurious petitions raising basic qualifications issues.

7. In this connection, Mr. Cavallo strongly suggests it is unlikely that adopting a liberal settlement policy will substantially impact Treasury receipts. Preliminarily, of course, revenue considerations are not a relevant consideration of the Commission in fashioning its policies. See 47 U.S.C. § 309(j)(7). In any event, with the possible exception of a future auction of non-digital TV spectrum, which is years away, auctions for most broadcast properties are unlikely to bring in significant revenue to the Treasury. Most markets are small, and whatever revenue is generated for the government is likely to be consumed in the additional processing costs occasioned by the auction and litigation following. Allowing the parties the opportunity to settle a contested proceeding will thus encourage the rapid availability of service without a significant adverse impact on Treasury receipts.

^{2/} (...continued)

clear that financially unqualified applicants have a tendency to overbid for spectrum. When this happens, and those applicants default or file for bankruptcy, serious delays in effecting service to the public can result.

^{3/} Where a substantial and material factual issue is raised concerning an applicant, or where the Commission is otherwise unable to grant an application on the existing record, the Commission is required set the application for hearing. See 47 U.S.C. §309(e).

8. Nor is it likely that allowing applicants to make a profit through entering into a settlement agreement will encourage insincere applicants. Without the potential for the award of a "free" license in a comparative hearing, the incentive for an insincere applicant to file an application is substantially diminished. Moreover, the auction process itself further serves to lessen the incentive for insincere applicants because such applicants would -- by definition -- have no interest in paying the substantial costs of filing an application, generally running in the range of \$10,000, only to then having to bid at auction for a facility which they really have no interest in owning. What allowing settlements for a profit will encourage, however, is quick resolution of proceedings, by offering applicants a graceful way to leave a contested proceeding with some degree of profit for the substantial time investment inherent in prosecuting a broadcast application.

III. The Commission should expedite this proceeding and subsequent auctions of broadcast facilities.

9. As Mr. Cavallo has indicated above, he considers encouragement of expedition of service to the public of paramount significance. Accordingly, he requests the Commission to expedite resolution of this proceeding and scheduling of the broadcast auctions authorized hereby. In Mr. Cavallo's specific situation, he has spent considerable time and effort in developing his business plan for his proposed Lenwood and Baker facilities. Delay in awarding the licenses for those facilities frustrates his ability to implement his plans in addition to denying the

communities of license additional outlets for the expression of opinion and viewpoint. Expedition of this proceeding and of the auctions being authorized hereby is thus plainly in the public interest.

10. Furthermore, the Commission should take steps to expedite the award of licenses following an auction, and disincite disappointed bidders from raising spurious objections to winning bidders. The Commission should adopt rules providing that petitioner to deny high bidders who file procedurally defective petitions, or who fail to raise a prima facie question of the applicant's qualifications, will be liable for the attorneys fees and costs reasonably expended to oppose such filings. Moreover, Commission action on such petitions and review proceedings on their denial should be expedited so that the public is not deprived of service by lengthy post auction proceedings. In this way frivolous or near frivolous petitions will be discouraged, saving substantial private and public resources.

IV. Auction procedures.

11. The Commission has requested comment on several aspect of its proposed auction procedures. Three matters, those of reserve bids, eligibility to participate in the auctions, and bidding credits in the auction, deserve comment.

A. Reserve prices.

12. The Commission (NPRM at para. 57) proposes to establish reserve bids for broadcast auctions in consultation with the Wireless Telecommunications Bureau. Where spectrum for new

technologies, or spectrum with no established use is proposed to be auctioned, a reserve bid is appropriate given the uncertainties inherent in auctioning spectrum of uncertain value. In the context of broadcast spectrum, however, reserve bids would not be in the public interest. The broadcast service is well established, with an active market for the sale of broadcast stations. Accordingly, the market can be trusted to assure that fair value is bid in the auction for such facilities. No need for reserve prices is necessary in those circumstances.

B. Eligibility to participate in broadcast auctions.

13. The Commission has asked for comment whether participation in an auction for a facility where the filing window has closed should be limited to applications already on file, or whether it should reopen filing windows for such facilities. See *NPRM* at para. 42. The Commission should not reopen any filing windows. All interested applicants have had the opportunity to file for closed facilities. Nothing would be gained by giving these potential applicants another bite at the apple. In Mr. Cavallo's case, he has spent considerable effort preparing and filing his pending applications. It would be unfair to subject him and the other mutually exclusive applicants to another round of application filings. Moreover, reopening filing windows would serve to unduly delay new service to the public. Accordingly, the Commission should decline any temptation to reopen closed filing windows.

C. Treatment of designated entities.

14. As the Commission acknowledged, Section 309(j)(4)(D) provides that in prescribing auctions rules, the Commission must "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the option to participate in the provision of spectrum-based services," and specified that the Commission should, *inter alia*, consider the use of bidding credits to achieve that purpose. See *NPRM* at para. 83.

15. Given the relative values of broadcast spectrum, compared to other spectrum based services, such as PCS spectrum, Mr. Cavallo does not see that special Commission action is necessary to ensure the opportunity of rural telephone companies to participate in the provision of broadcast services. However, with respect to other designated entities, such as small businesses and minority owned enterprises, special Commission action is necessary and appropriate to ensure their opportunity to participate in the provision of broadcasting.

16. It cannot be seriously disputed that substantial concentration in the ownership of the media of mass communications has recently occurred. Every day brings additional reports of media consolidation; and that consolidation does not bode well for diversification of the ownership of the media of mass communications. As the *NPRM* (at para. 86) recounts, minority ownership of broadcast stations even declined from 3.07 percent in 1995 to 2.81 percent in 1996-97. That figure can be expected to

decline further as a result of auctions of broadcast facilities. As the *NPRM* (at para. 92) points out, multiple station owners have the ability to benefit from economies of scale of operations, and are thus likely to value broadcast spectrum at a higher level than other applicants.

17. Because of the advantages existing broadcasters have over persons who do not own broadcast facilities, unless small business, minorities, and non-broadcast holding applicants are afforded bidding credits, they are not likely to obtain broadcast facilities at auction. Given the First Amendment values fostered by maximizing the available sources of opinion and viewpoint, a compelling case exists for awarding these classes of applicants bidding credits. In this connection, Mr. Cavallo acknowledges that with respect to preferences based on race, the Constitution requires that such preferences be supported by a compelling state interest and be narrowly tailored to the achievement of that compelling interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The award of bidding credits to minorities plainly meets even this high standard of review.

18. The encouragement of minority ownership is focused on fostering diversity of programming and content to the public. This is a core First Amendment value. As Justice Holmes explained, the ultimate test of truth is the power of a "thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). For that to happen, of course, ones idea must get to the marketplace. Fostering diversity of

ownership is likely to result in maximizing diversity in viewpoint because the more voices allowed to speak, the greater chance that different ideas will be spoken.

19. Moreover, it is important specifically to encourage minority ownership of broadcasting facilities, because minorities do indeed have a unique perspective and viewpoint for the very reason that they are minorities. Although we must be careful to avoid stereotyping persons as a result of their group affiliation, it would be defying reality to assume those affiliations have no influence on an individual's thought processes, especially where that affiliation is racial.

20. Moreover, the award of bidding credits to minorities is a narrowly tailored means to achieve the government's compelling interest in encouraging diversity of opinion and viewpoint. Bidding credits will directly aid minorities and small businesses in being able to compete in an auction against better financed, multiple owners. Accordingly, encouraging diversification in opinion and viewpoint through bidding credits to minorities is not only Constitutionally acceptable, but is plainly necessary to effectuate Congress's will.

21. Mr. Cavallo suggests the following scheme of bidding credits. Small business entities, with average net revenues of less than \$3 million, would be entitled to a bidding credit of 15 percent. If this entity also held no other attributable media interest, it would be entitled to an additional 15 percent bidding credit. And if this entity was also a minority controlled entity,

it would be entitled to an additional 15 percent bidding credit.^{4/} Moreover, if an applicant were bidding in an auction against another entity which held an attributable interest in a broadcast station the service contour of which overlapped its proposed service area, then the applicant(s) without interests with overlapping contours would be entitled to a bidding credit of five percent each station held in the market by its competitor, in addition to any other bidding credits to which such applicants were entitled. In this way, meaningful diversity of programming and content, both in general and in the specific service area in question would be encouraged.

22. Finally, although Mr. Cavallo would award bidding credits for small businesses, diversity of ownership, and minority status, he would not afford other concessions, such as installment payments. Recent events concerning other Commission auctions, such as the PCS auctions, indicate too high a potential for defaults and overbidding from applicants who are afforded installment payments.

23. Finally, a case might be made that bidding credits would be appropriate in the case of other factors which were previously credited under the Commission's comparative hearing criteria, such as local ownership, broadcast experience, etc. See *Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 5 Rad Reg. 2d (P&F) 1901

^{4/} Mr. Cavallo would award the small business and diversity bidding credits independent of each other. However, because of the Constitutional requirement that a race-based measure be narrowly tailored to achieve a compelling state interest, the minority bidding credit should be awarded solely where both the small business and the diversity bidding credits also apply.

(1965). However, Mr. Cavallo suggests that awarding bidding credits for such factors risks turning the auction into a mini-comparative hearing, with all the attendant risks of litigation spawned by therefrom. See, e.g., *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992). Bidding credits should therefore be limited to those entities specifically designated by Congress in Section 309(j)(3)(B).

V. Conclusion.

24. Spectrum auctions for broadcast properties can help achieve improved public service without the delay that has marked the comparative hearing process. In implementing the Congressionally mandated spectrum auctions, the Commission must take steps to ensure that delay does not frustrate the public interest in the provision of expedited broadcast service. Relaxing current restrictions in the rules on applicants profiting from settlements will encourage expedited provision of service. Likewise, taxing costs and attorneys fees on parties filing petitions to deny or other opposition pleadings which facially lack a prima facie showing in support of the relief requested, and expediting resolution of contested licensing cases will further avoid administrative delay. Furthermore, in fashioning the procedural details of the auction, the Commission must be fair to parties who have filed applications in markets where filing windows have closed by limiting the bidders to those who timely filed mutually exclusive applications. Finally, the Commission should implement the Congressional mandated requirement that provision be

made for encouraging ownership by small businesses and other underrepresented groups through bidding credits to small businesses, existing entities not holding media interests, and minorities.

Respectfully submitted,

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